HASAMUDDIN TALENA

v.

PP

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CRIMINAL APPEAL NO: J-05-28-1995]
18 FEBRUARY 2002

EVIDENCE: *Information leading to fact discovered - Actual words must be proved - Statement allegedly made by accused during interrogation not recorded - Statement allegedly made by accused at place of discovery not recorded - Whether approximations or paraphrasing acceptable - Whether police report lodged subsequently by interrogator sufficient - Whether accused's conviction safe - Evidence Act 1950, s. 27 - Dangerous Drugs Act 1952, s. 39B(1)(a)*

The appellant was arrested on suspicion of being involved with dangerous drugs. Whilst in police custody and under interrogation he was alleged to have made a statement to the effect that he could lead his interrogators to a place where drugs were concealed. The appellant was then brought to the said place whereupon he was alleged to have made a second statement and proceeded to point out where the drugs were concealed. The police then found plastic packets containing substances which upon analysis turned out to be 79.2g of heroin. The appellant was later tried and convicted for trafficking in a dangerous drug under s. 39B(1)(a) of the Dangerous Drugs Act 1952. The only issue in the instant appeal was whether the prosecution had proved the 'information leading to the fact discovered' which the appellant was alleged to have given to the police.

Held:
Per Gopal Sri Ram JCA

[1] The exact words of the two statements allegedly made by the appellant during his interrogation and at the place where the drugs were discovered respectively were not reduced into writing as soon as it was practicable to do so. In respect of the first statement, there was no excuse for the interrogator's failure to take down the questions put to and the responses received from the appellant either during the interrogation or immediately thereafter. In respect of the second statement, the interrogator should have put it down in writing in his diary as soon as he returned from the scene of the crime. The appellant's conviction, which rested squarely on these two statements, were therefore wholly unsafe. (pp 507 a-e & 508 f)

[2] Where the prosecution seeks to rely on information under the inclusionary provisions of s. 27 of the Evidence Act 1950, approximations are not permitted. The exact words spoken by the accused have to be strictly proved. There should also be no paraphrasing. No judge should allow one word more to be deposed to by the police than it is absolutely necessary to show how the fact discovered is connected with the accused. (pp 507 f-g & 508 d-e)

[Appeal allowed; conviction quashed; sentence set aside.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu telah ditahan kerana disyaki terlibat dengan dadah berbahaya. Ketika dalam tahanan polis dan ketika sedang diinterogasi beliau didakwa telah membuat kenyataan yang bermaksud bahawa beliau boleh membawa interogator tersebut ke satu tempat di mana dadah disembunyikan. Perayu telah kemudiannya dibawa ke tempat tersebut di mana beliau telah didakwa membuat kenyataan kedua dan terus menunjukkan di mana dadah disembunyikan. Polis kemudiannya terjumpa paket-paket plastik yang mengandungi bahan yang setelah dianalisa di dapati merupakan dadah heroin seberat 79.2g. Perayu telah kemudiannya dibicarakan dan disabitkan kerana mengedar dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah berbahaya 1952. Satu-satunya isu dalam rayuan semasa adalah sama ada pihak pendakwaan telah membuktikan maklumat yang membawa kepada fakta yang dizahirkan, yang mana di dakwa telah diberikan oleh perayu kepada polis.

Diputuskan:
Oleh Gopal Sri Ram JCA

[1] Perkataan-perkataan yang tepat dari kedua-dua kenyataan tersebut yang diperkatakan telah dibuat oleh perayu ketika beliau disoal-siasat dan ditempat di mana dadah tersebut dijumpa masing-masingnya telah tidak dituliskan sebaik sahaja ianya boleh dipraktikkan. Berhubung kenyataan pertama, tidak terdapat sebarang alasan bagi kegagalan interogator untuk mencatatkan soalan-soalan yang dikemukakan dan jawapan-jawapan yang diterima daripada perayu sama ada ketika disoal-siasat atau sejurus selepas itu. Berhubung kenyataan kedua, interogator tersebut sepatutnya telah mencatatkannya secara bertulis dalam diari beliau sebaik sahaja beliau kembali daripada tempat jenayah. Pensabitan perayu yang berdasarkan kepada kedua-dua kenyataan ini, adalah dengan itu sesungguhnya tidak selamat.

[2] Di mana pihak pendakwaan cuba untuk bergantung pada maklumat di bawah peruntukan s. 27 Akta Keterangan 1950 jangkaan adalah tidak dibenarkan. Perkataan-perkataan tepat yang diucapkan oleh tertuduh haruslah dibuktikan dengan tegasnya. Tidak seharusnya juga terdapat sebarang pengubahan dengan kata-kata yang lain. Mana-mana hakim pun tidak seharusnya membenarkan satu perkataan lebih sekalipun dideposkan oleh pihak polis tetapi sekadar perlu untuk menunjukkan bagaimana fakta yang dizahirkan itu dikaitkan dengan tertuduh.

[Rayuan dibenarkan; sabitan dibatalkan, hukuman diketepikan.]

Case(s) referred to:
Birch v. PP [1978] 1 MLJ 72 ***(foll)***
Muhamad Hassan v. PP [1998] 2 CLJ 170 ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 ***(foll)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B(1)(a)
Evidence Act 1950, s. 27

Other source(s) referred to:
Sarkar on Evidence, 14th edn, p 492

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Kamarul Hisham Kamaruddin DPP

Reported by Gan Peng Chiang

JUDGMENT

Gopal Sri Ram JCA:
There is only one point in this case. It is whether the prosecution has satisfactorily proved the information leading to discovery which the appellant allegedly gave to the police in the course of investigation.

The factual matrix against which the point arises falls within a narrow compass. On 1 July 1993 the appellant was arrested on suspicion of being involved with drugs. While in police custody he was interrogated by PW5 (Chief Inspector Nordin). It is alleged that during the interrogation the appellant made a statement to the approximate effect that he could lead his interrogators to the place where certain drugs had been concealed. Shortly thereafter, a police party that included PW5, PW6 and PW7 proceeded to the 24th milestone Pekan Nenas, Johor. It is part of the prosecution's case that at the scene the appellant made a second statement and pointed to the place where the drugs were concealed. The police did in fact find a plastic packet which contained two smaller plastic bags, the contents of which upon analysis, proved to be 79.2 grams of heroin. The appellant was later charged, tried and convicted with trafficking contrary to s. 39B(1)(a) of the Dangerous Drugs Act 1952.

At the trial of the appellant, evidence was adduced of the two statements to which reference has already been made. It was conceded by PW5; and there is no dispute about this; that the exact words used by the appellant during his interrogation or at the scene were not reduced into writing as soon as practicable. The prosecution, however, seeks to answer this by referring to exh. P16. That document is a police report. It was lodged by PW5 on the day of the incident, but some 3 1/2 hours after the appellant's alleged first statement. It was certainly after the discovery of the drugs. Exhibit P16 sets out the questions, that PW5 supposedly put to the appellant and the supposed responses to these questions. The learned deputy, who has very ably responded to this appeal argued, but with some diffidence, that exh. P16 was a contemporaneous document in the circumstances of the case. With respect, we are unable to agree. A careful reading of the record, in particular the notes of evidence recorded by the learned trial judge, reveals no excuse or reason for PW5's inability to take down the questions put and the responses received, either during the interrogation or immediately thereafter. As a matter of practice, if it is not done immediately, but a little later, it might be safer to read the questions and answers over to the provider of the information to ensure that what has been put down on paper is exactly correct. That procedure is, however, academic here for the reasons already given.

In the case of the second statement, we see no difficulty in PW5 putting that information down in writing in his diary soon after returning from the scene.

These matters constitute some of the unsatisfactory features of this case.

There is, in our view, no dispute about the proposition of law that is applicable to the facts already narrated. It is settled beyond argument that where the prosecution seeks to rely on information under the inclusionary provisions of s. 27 of the Evidence Act 1950, approximations are not permitted. In other words, the exact words spoken by an accused have to be proved. An illustration of that proposition may be found in *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265, where Abdul Hamid Omar LP reminded us of the need for vigilance, "to ensure the credibility of evidence by the police personnel in respect of this section, (that is, s. 27) which is so vulnerable to abuse".

The rationale for the rule adverted to a moment ago appears in the judgment of Syed Agil Barakbah J (as he then was) in *Birch v. PP* [1978] 1 MLJ 72. This is what he said:

> Information leading to the discovery must relate distinctly to the object so recovered and nothing more. Only so much of such information is admissible. Where such information is held to be admissible, the action of the accused which directly leads to such discovery, in this case the act of the appellant in

> approaching the green bag and opening it, is of little value and ought to be treated with caution as it is prejudicial to the accused. Further, there was no indication one way or the other what had caused the appellant to lead the police there. Whether her intention was to confess her guilt or to indicate Mohd. Desa's guilt still remain uncertain. To my mind, since more than one inference has arisen, the inference in favour of the defence ought to be accepted.

Since nothing more than the information given by an accused is admissible, it follows that the information must be exact and recorded in the language or words used by the accused.

The strictness of the rule in the application appears sufficiently from the following passage in *Sarkar on Evidence*, 14th edn. at p. 492:

> Statements made by accused to police officers which are or may be provable under s. 27 should be clearly and carefully recorded. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased (*In re Athappa Goundan* AIR [1937] Mad. 618; *In re Ramamurthy* AIR [1941] M 290; *Naresh v. R*, 46 CWN 180; *Public Prosecutor v. Pasala* AIR [1945] Mad. 202; *Public Prosecutor v. Venkoba* [1937] MWN 73, *Chenna v. King Emperor* AIR [1940] Mad. 710, *Gaya v. State* AIR [1957] All. 459; *Nathu v. State* AIR [1958] All. 46.) No judge should allow one word more to be deposed to by the police than it is absolutely necessary to show how the fact discovered is connected with the accused.

We have addressed our minds to the question whether the strict test has been met by the facts of the present appeal. After anxious consideration we hold that it has not. The danger of abuse to which the Lord President referred in *Pang Chee Meng (supra)* appears to apply plumb to the present facts. These observations then lead us to the logical conclusion that the conviction in the present case is entirely unsafe. The learned deputy who argued this appeal has with customary frankness conceded that the entire prosecution's case rests on these two supposed pieces of information leading to discovery. Once they fall, so must the prosecution's case.

The issues we have thus far discussed make it unnecessary for us to address the other arguments raised by the appellant. Amongst these arguments was a submission based on the decision of the Federal court in *Muhamad b. Hassan v. PP* [1998] 2 CLJ 170. We are not saying that the submission is without merit. All we are saying is that it is unnecessary for us to deal with it.

For the reasons already given, it is plain where our duty lies. The appeal is allowed, the conviction is quashed and the sentence imposed is set aside.

Before concluding, we wish to express our appreciation to learned counsel for the appellant and Encik Kamarul Hisham, the learned deputy without whose able assistance this judgment would not have been possible.